No. 75-1162

Supreme Court, U. S.
FILED
APR 29 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

WINTERS BATTERY MANUFACTURING COMPANY,
PETITIONER

v.

W. J. USERY, JR., SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 27-44) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1975. The petition for a writ of certiorari was filed on February 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the summary enforcement provisions of Section 11(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(b), violate the Due Process Clause of the Fifth Amendment to the Constitution.

2. Whether the administrative enforcement provisions of Section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 659, violate the Fourth, Fifth, Sixth and Seventh Amendments to the Constitution.

STATEMENT

1. The Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, authorizes the Secretary of Labor to conduct safety and health inspections at places of employment. If upon inspection or investigation the Secretary has cause to believe that the Act or its implementing regulations have been violated, he is empowered to issue a citation to the employer specifically describing the violation, fixing a reasonable time for its abatement, and proposing a penalty. 29 U.S.C. 657(a), 658, 659, 666. The Secretary may also propose further civil penalties where subsequent inspection reveals that outstanding final abatement orders have not been satisfied. 29 U.S.C. 659(b), 666(d).

If an employer wishes to contest the citation or the proposed penalty, he must notify the Secretary within 15 working days; in the absence of such notice, the citation and proposed assessment become "a final order of the [Occupational Safety and Health Review] Commission and not subject to review by any court or agency." 29 U.S.C. 659(a) and (b). If the employer timely contests, the Secretary is required to file a complaint before the Commission (an adjudicatory agency independent of the Secretary) alleging jurisdiction and the factual bases of the contested violations, proposed penalties, and abatement requirements; after the employer has answered the complaint, an evidentiary hearing is held before an administrative law judge. 29 U.S.C. 659(c); 29 C.F.R. 2200.33. Following the hearing, the judge must issue a report either affirming, modifying, or vacating the citation, abatement requirement and proposed penalty, which report becomes the Commission's final order unless within 30 days a Commissioner directs that it be reviewed. 29 U.S.C. 659(c), 661(i). Employers may obtain judicial review of a final Commission decision in the court of appeals. 29 U.S.C. 660(a).

The period of abatement of a violation ordinarily runs from the date that the Commission's order becomes final. The Act provides, however, that employers who do not contest the citation may secure relief from abatement requirements by petitioning to extend their time for abatement. 29 U.S.C. 659(c). If the Secretary disagrees that the proposed extension is justified, the employer's petition to enlarge the abatement period is heard and decided by the Commission, whose decision is reviewable in the same manner as any other final Commission order issued following a hearing. 29 U.S.C. 659(c), 660(a); 29 C.F.R. 1903.14a 2200.34.[1]

Finally, if the cited employer fails to contest a citation or to petition for judicial review, the Secretary is empowered to ensure abatement by seeking a summary judicial decree, enforceable by contempt, in the court of appeals. On the Secretary's application for summary enforcement of such final Commission orders, "the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order * * * ." 29 U.S.C. 660(b).

2. Petitioner is a corporation whose principal business is the manufacture and sale of automobile batteries. On February 12, 1973, after a routine inspection, the Secretary

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[1]The Subcommittee on Labor of the Senate Committee on Labor and Public Welfare noted with respect to this provision: "It is anticipated that in many cases an employer will choose not to file a timely challenge to a citation when it is issued, on the assumption that he can comply with the period allowed in the citation for abatement of the violation. In some such cases the employer may subsequently find that despite his good faith efforts to comply, abatement cannot be completed within the time permitted because of factors beyond his reasonable control * * * . In order to prevent unfair hardship, the bill provides that in such instances the employer may obtain review and modification * * * of the abatement requirements specified in the citation, even though the citation has otherwise become final." Legislative History of the Occupational Safety and Health Act of 1970, 92d Cong., 1st Sess. 154-155 (1971).

cited petitioner for one serious and seven non-serious violations of the Act. The serious violation concerned exposure of employees to as much as four times the permissible level of airborne lead (Pet. App. 18-20, 29).[2] The Secretary directed that the lead violation be abated by June 10, 1973, and served petitioner with a total proposed penalty of $1,400 (Pet. App. 20-22). Despite express warnings in both the citation cover letter and penalty notification that failure to contest the citation within 15 working days would result in their becoming "final" orders "not subject to review by any court or agency" (Pet. App. 22, 29-31),[3] petitioner failed to contest either the citation or the proposed penalty.

On May 30, 1973, petitioner requested a six-month extension of the June 10 airborne lead violation abatement date. The Secretary did not object, and the period for compliance was extended to November 10, 1973 (Pet. App. 31). On November 5, 1973, petitioner sought a second six-month extension, which the Secretary refused. The parties agreed, however, that abatement could be accomplished by December 15, 1973, and the Commission granted an extension to that date. When an inspection on December 27, 1973, revealed that the airborne lead hazard still had not been abated, the Secretary issued a notification of failure to abate and proposed penalties totaling $1,025. Again petitioner did not contest within 15 days and the notification became final. On February 27, 1974, petitioner requested and was granted another six-month extension of its abatement date until September 1, 1974. After the expiration of this third extension of the period for abatement, an inspection on September 3, 1974, uncovered

[2]Exposure to excessive airborne lead levels may result in permanent nerve damage, partial paralysis, and other disabling syndromes. See *American Smelting and Refining Co.* v. *Occupational Safety and Health Review Commission*, 501 F.2d 504 (C.A. 8).

[3]The citations also stated that "[t]he issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act * * *" (Pet. App. 18-20).

the same airborne lead violations in petitioner's facility as had existed at the time of the original inspection (Pet. App. 31).

On April 7, 1975, pursuant to 29 U.S.C. 660(b), the Secretary filed a petition for summary enforcement of the two outstanding uncontested and final orders with the clerk of the court of appeals. On July 2, 1975, after petitioner filed an answer and the Secretary responded, the clerk, acting at the direction of the Chief Judge of the court of appeals, entered an order of enforcement (Pet. App. 27-29, 31). Petitioner then filed a petition for rehearing *en banc*, raising for the first time several constitutional challenges to the Act's enforcement scheme. The court denied *en banc* consideration, but ordered oral argument on the petition for rehearing (Pet. App. 26, 29).

After briefing and argument by the parties, the court of appeals unanimously rejected petitioner's contention that the Act violates the Fourth, Fifth, Sixth and Seventh Amendments to the Constitution, refused to consider petitioner's evidentiary claims "because we have determined in this case that the OSHA decision is final and not subject to review" on the merits (Pet. App. 41), and thus affirmed its previous order enforcing the uncontested citations. Specifically, the court dismissed petitioner's assertion that the Act denied due process by making citations and non-abatement notifications final unless contested within 15 working days, stating (Pet. App. 42):

> Under the provisions of the Act, [petitioner] had an opportunity for a due process hearing before an Administrative Law Judge and the Commission * * * which it failed to exercise. We find no deprivation of due process.

ARGUMENT

1. Petitioner's principal contention (Pet. 8-12)—that the Act's provisions making citations and penalty assessments final absent a timely employer contest contravene its due process right to a hearing—was properly rejected by the court of appeals, which explicitly noted the availability of a full evidentiary hearing, subject to administrative and judicial review, upon the filing of a timely notice of contest. This holding accords with the unanimous rulings of every other circuit that has considered the question. *Clarkson Construction Co.* v. *Occupational Safety and Health Review Commission,* C.A. 10, No. 75-1070, decided January 21, 1976; *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission,* 519 F. 2d 1200, 1205-1206 (C.A. 3), certiorari granted on another issue, No. 75-748, March 22, 1976; *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission,* 518 F. 2d 990, 1012 and n. 58 (C.A. 5), certiorari granted on another issue, No. 75-746, March 22, 1976;[4] *McLean Trucking Co.* v. *Occupational Safety and Health Review Commission,* 503 F. 2d 8, 11 (C.A. 4). Cf. *Dan J. Sheehan Co.* v. *Occupational Safety and Health Review Commission,* 520 F. 2d 1036, 1039 (C.A. 5), certiorari denied, No. 75-747, March 22, 1976. It is also consistent with numerous decisions of this Court that due process is satisfied so long as a statute affords adequate opportunity for a hearing, that Congress may provide an exclusive forum and procedure for review of agency action, and that a party's failure to seek review in the forum or by the procedure provided may constitute a waiver of its rights. See, *e.g.*,

[4]In *Atlas Roofing* and *Irey*, although petitioners contended that the Act is criminal in nature, the Court did not grant certiorari on that issue but limited its review to the question whether the Act's procedures "deny the defendant employer his right to jury trial guaranteed by the Seventh Amendment to the Constitution." See p. 8, *infra*.

Rowan v. *Post Office Department,* 397 U.S. 728, 739; *Lichter* v. *United States,* 334 U.S. 742, 791; *United States* v. *Ruzicka,* 329 U.S. 287, 292-293; *Yakus* v. *United States,* 321 U.S. 414, 433. See also *National Independent Coal Operator's Association* v. *Kleppe,* No. 73-2066, decided January 26, 1976; *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 611.[5]

2. Petitioner claims (Pet. 12-13) that the certified administrative record does not contain evidence supporting the serious nature of the airborne lead violation or of its status as a covered employer under the Act and that the court of appeals could not enforce the Commission's order in the absence of such evidence. The asserted record gaps exist, however, only because petitioner failed to request a hearing before the administrative law judge, at which such evidence would have been adduced.[6]

3. Finally, petitioner's contention (Pet. 14-15) that various aspects of the Act's enforcement scheme contravene the Fourth, Fifth, Sixth and Seventh Amendments

[5]Petitioner's related contention that it is impermissible to infer waiver from its failure to contest (Pet. 15-16) is inapposite under this civil statute. *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission, supra;* cf. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 235, 237. As the court of appeals noted (Pet. App. 29-31), the consequences of a failure to contest were repeatedly emphasized to petitioner.

[6]Petitioner's contention (Pet. 8, 11-12) that the Act unfairly discriminates against cooperating employers, who "forfeit all [their] constitutional and legal rights" if they attempt to abate rather than contest, overlooks noncontesting employers' express right to seek extensions of their abatement requirements, subject to full administrative and judicial review, if they discover that they cannot abate within required time periods. It also overlooks petitioner's own experience under this provision, which shows that the company successfully sought three extensions totaling more than thirteen months. See pp. 3-5, *supra.* Not until petitioner abandoned the prescribed procedure by failing to request further extensions, denial of which by the Commission would have been a reviewable Commission order under 29 U.S.C. 659(c) and 660(a), did it become subject to summary enforcement.

was waived by its failure to contest these citations before the Commission, which might have vacated the citations or otherwise eliminated the need for judicial review. See *W. E. B. DuBois Clubs* v. *Clark*, 389 U.S. 309, 311-312; *McKart* v. *United States*, 395 U.S. 185, 194-195; *Lance Roofing Co.* v. *Hodgson*, 343 F. Supp. 685, 688-689 (N.D. Ga.), affirmed, 409 U.S. 1070; *Frank Irey, Jr., Inc.* v. *Hodgson*, 354 F. Supp. 20 (N.D.W. Va.), affirmed, 409 U.S. 1070.

In any event, the court of appeals' decision is in agreement with the uniform rejection of these constitutional arguments by other circuits. See, *e.g.*, *Clarkson Construction Co.* v. *Occupational Safety and Health Review Commission*, *supra*; *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, *supra*; *Beall Construction Co.* v. *Occupational Safety and Health Review Commission*, 507 F.2d 1041 (C.A. 8); *Frank Irey, Jr., Inc.* v. *Occupational Safety and Health Review Commission*, *supra*. Cf. *Underhill Construction Corp.* v. *Secretary of Labor*, 526 F. 2d 53, 57, n. 10 (C.A. 2). While this Court has granted certiorari to review the Seventh Amendment claims raised in *Atlas Roofing* and *Irey*, see p. 6, n. 4, *supra*, there is no reason to hold this case pending that decision. Even if an employer must receive a civil jury trial upon the filing of a timely notice of contest, petitioner is not entitled to that right because it did not contest the Secretary's citation. Cf. Fed. R. Civ. P. 55(a).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1976.

DOJ-1976-04